No. 11,536

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
Appellant,

vs.

IRENE ZEHNLE and JERRY ZEHNLE, a Minor, by his Guardian Ad Litem, IRENE ZEHNLE,
Appellees.

APPELLANT'S PETITION FOR A REHEARING

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The above named appellant, Southern Pacific Company, a corporation, respectfully petitions your Honorable Court for a rehearing of the above entitled cause after affirmance by it of the judgment made and entered in the District

Court of the United States in and for the Northern Division of the Northern District of the State of California, upon the grounds as hereinafter set forth.

The primary ground for rehearing urged is that the opinion is based upon an unwarranted construction of both the laws of the State of Utah and the State of California, on what constitutes a recoverable pecuniary loss to the beneficiary caused by wrongful death.

The appellant has particular reference to the apparent basis of the holding of the court that "the evidence of a *likelihood* of a child losing such support, society, care, comfort and protection is sufficient to sustain the verdict." The only basis for such finding appearing in the opinion, is

(a) That since the custody of a son may be changed by the court from the mother to the father, so that the minor son "may have male training to equip him to meet the world," the jury "may well have inferred that there was a substantial likelihood that this loving father and his son would come together in a father guardian relationship," and

(b) That if the question of the father's liability to support his son had been litigated in the Nevada Court, it may well have been for the latter's full support.

Therefore, as it appears from the opinion, this court has sustained a Twenty Thousand Dollar verdict solely through a practice long condemned by local law, that is, permitting an allowance for purported pecuniary loss to be based upon a mere likelihood or upon circumstances which did not appear from the evidence, but which rested upon conjecture and imagination. The local law does not

permit a change of the custody of a minor from one parent to another, except when there exist facts and circumstances showing that the parent having the custody is morally unfit or mentally incompetent to have the custody of the child, or the presence of some other facts which would require the change for the welfare of the minor. Furthermore, no court would require the father to provide full support, unless the evidence showed that the father could give or was better able than the mother to provide such support. In the case at bar, there is no evidence showing a reasonable probability of an existing circumstance or of the future existence of any circumstances, that would warrant a court in changing the custody of the appellee from his mother to his father, had the latter survived. Likewise, there is no evidence of the earnings, if any, of the decedent since the summer of 1941 (other than during the foregoing four months service in the Merchant Marine), nor any evidence of Mrs. Zehnle's earnings. No court would, or could fix the liability of either parent in any action between them with such absence of essential evidence, particularly when the evidence is or should have been easily made available.

If these suggested liabilities of deceased could not have been imposed upon the deceased, if he had lived, under such a record as existed in the case at bar, how could a different and a grossly excessive liability be imposed upon the appellant, except by way of punitive damages or punishment? If this opinion is permitted to stand, a new and different measure of damages in death cases will be created for the Federal courts, which is absolutely in conflict with local law, with a result that plaintiffs in death

cases would seek to litigate in the Federal courts, in lieu of the State courts (when the defendant is a non-resident), in order to gain a verdict which is not legally obtainable in the State court. Such a procedure would deprive a non-resident of due process and of a fair or impartial trial, the very conditions that prompted granting of jurisdiction to Federal courts in controversies between a non-resident party and a resident party.

I.

THE OPINION IGNORES AND IS IN CONFLICT WITH RULES ESTABLISHED FOR THE ASSESSMENT OF DAMAGES IN DEATH CASES BY LOCAL LAW.

An action for wrongful death is governed by the law of the jurisdiction where the tort is committed (see 8 Cal. Jur., 976), that is, in the case at bar, the law of the State of Utah.

Section 2912 of the Compiled Laws of the State of Utah of 1907, one on which this action is based, is identical to Section 377 of the Code of Civil Procedure of the State of California, that is, "such damages may be given as under all of the circumstances of the case may be just." A research will reveal that the courts of both states have been fairly uniform in their construction and operation of the statute. As to the limits of recovery in a death case in the State of Utah, the leading case appears to be *Evans v. Oregon Short Line R.R. Co.,* 108 Pac. 638, where the court, on page 641, clearly states the measure of recovery as follows:

> "True, the loss under our statute in a large sense is a pecuniary loss merely, since nothing can be re-

covered by way of solace for injured feelings or for mental suffering of the family by reason of the death of the husband and father. Whatever is allowed by the jury must therefore be by way of pecuniary recompense for the loss sustained by the wife and minor children, and must be *strictly limited* (1) *to what the evidence shows the deceased contributed, and thus would probably have continued to contribute* to them in money or other means by way of support and as an accumulation to his estate; and (2) to the money value of the injury suffered by the wife and minor children by reason of the loss of the advice, comfort, and society which they enjoyed prior to the death of the deceased and which would have been continued for their benefit. *If the evidence is to the effect* that the widow and minor children suffered no loss upon the first ground because the deceased provided neither money nor other means of support, they still may be entitled to something upon the second ground, because the society of the deceased may have been a comfort and his advice of material assistance to them. Again a wife and children may have lost little or nothing upon either or both grounds, and the jury should then compensate them only for what they have lost, and, in case they have lost upon both grounds, they should receive compensation to the extent of their loss. The jury should be informed that any allowance they may make must be limited to what the wife and children received from the deceased upon either one or both grounds to which we have referred * * *" (Italics ours)

Further, the Court stated on page 641:

"The statute clearly implies that, in order to arrive at the real injury the wife or the minor children have sustained, the *jury should be advised of just*

what they received from the deceased by way of pecuniary aid and assistance, and also what they received from him by way of comfort, advice and companionship.'' (Italics ours)

The California courts also followed the principle announced in the *Evans* case, supra, as is clearly shown by the statement appearing in *Johnson v. Western Air Express Corporation,* 45 Cal. App. (2d) 614 at 623, where the court stated:

> ''The measure of damages in such case is what the heirs were receiving at the time of the death of the deceased and what such heirs would have received had decedent lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation.''

In other words, the measure of damages is strictly limited as to what the evidence shows the beneficiary had received during the life of the decedent, and to that which the evidence shows would in all reasonable probability have been continued for their benefit, if the decedent had lived. Hence, under the local law, in the absence of proof tending to show an actual damage or a probable loss with reasonable certainty resulting to the beneficiaries from the death, the beneficiaries' recovery should be limited to normal damages, or as stated in *Parsons v. Easton,* 184 Cal. at 774:

> ''* * * Manifestly, no allowance can be made because of a possible loss arising *from circumstances which do not appear from the evidence and which rest upon conjecture and imagination.''* (Italics ours)

The opinion completely ignores the evidence of what the decedent had contributed to the support of his child

during his lifetime, and also the money value of the loss (if any) of other benefits enjoyed prior to his death, and ignores the fact that there is a total lack of evidence that any contributions and benefits would have been continued, if the decedent had lived.

Since a child's pecuniary loss for the death of his father as stated in *Evans v. Oregon Short Line R.R. Co.,* supra, is limited to two elements of damage, a review of the evidence in regard thereto will demonstrate that a verdict of Twenty Thousand Dollars ($20,000.00), being the present value of the annuity for the minority of the appellee in the sum of One Hundred Thirty-one and 65/100 Dollars ($131.65), per month cannot be supported by the evidence.

II.

NO PROOF OF ANY SUBSTANTIAL LOSS OF COMFORT, SOCIETY OR PROTECTION

Under the law the loss, comfort, society or protection is recoverable only in the sense of and not in addition to pecuniary loss.

Morgan v. Southern Pacific Co., 95 Cal. 510;
Pepper v. Southern Pacific Co., 105 Cal. 339;
Parsons v. Easton, 184 Cal. 764;
Griffey v. Pac. Electric Ry. Co., 58 Cal. App. 509 at 519.

If the society of the deceased was of no financial value to the beneficiaries, no damages can be awarded for its loss. *Dickinson v. Southern Pacific Co.,* 172 Cal. 730, 731.

This expectation must be based upon some fact or facts aside from the relationship. *Griffey v. Pacific Electric Ry. Co.,* supra, at page 518.

The law recognizes that there may be a pecuniary loss from the death of a husband or father arising from such deprivations, but as stated in *Sanfillippo v. Lesser,* 59 Cal. App. 86:

> "* * * *But this is not a universal right existing in every case. It is allowable only where the 'circumstances' show a reasonable probability that the 'society, comfort, and protection' afforded to the surviving parent or wife was of such a character that it would be of pecuniary advantage to the parent or wife, and that a deprivation thereof would entail a pecuniary loss to them.* Thus in the Beeson case the court said: 'The loss of a kind husband might be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy.' *Manifestly no allowance can be made because of a possible loss arising from circumstances which do not appear from the evidence and which rest upon conjecture or imagination. The evidence in this case does not show circumstances indicating that the society, comfort and protection of the son had been of any appreciable pecuniary advantage to the plaintiffs, or any reasonable probability that it would be so in the future.* It may be that they dearly loved him and that they loved him the more because of his infirmities and helplessness. But it is pecuniary loss only, and not the loss of an object of love and affection that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person." (Italics ours)

In *Ure v. Maggio Bros. Co.,* 24 Cal. App. (2d) 490, the court restated the law in California on this question, as follows:

> "* * * *But it must never be forgotten that, in fixing the amount, the jury is always bound by the fundamental rule that the pecuniary value of the society, comfort, and protection is the limit of recovery for a loss of that character, and the amount allowed therefor must have some reasonable relation to the pecuniary value shown by the evidence. In this case the father doubtless dearly loved his daughter; but 'it is pecuniary loss only,* and not the loss of an object of love and affection, that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person'. (*Parsons v. Easton,* supra)." (Italics ours)

As to the past, the evidence shows that the appellee during the two and a half years of his life, had lived with and seen his father for only an eight month period (R. 61, 70), and at the time of death, the decedent had been legally deprived of the custody of his son* by a final decree of divorce of the Nevada court, which granted the sole care, custody and control to the mother. The legal effect of said decree of divorce was to separate the Zehnle family, the mother and child maintaining a household several thousand miles distant from the decedent's resi-

*Since the complaint in the Nevada action alleges that Jerry Zehnle resided with the plaintiff, Irene Zehnle in Washoe County, Nevada, the Nevada court had jurisdiction to award the custody of said child to the mother. (See *De La Montayna v. De La Montayna,* 112 Cal. 101, at 116). Hence, the power of the Nevada Court to grant custody of the child to the mother cannot be questioned.

dence. There was no evidence adduced showing any probability of a reconciliation between Mr. and Mrs. Zehnle. There is not an iota of evidence that Mrs. Zehnle would have surrendered the custody of her child voluntarily, nor is there any evidence of any circumstances existing or to exist in the future, which would justify a court in repudiating her custody and give custody to Zehnle, or if such circumstances would arise, when would it arise, five, ten or fifteen years hence? Such is the status of the record.

A review of the cases where the decedent and the beneficiary were living apart uniformly shows that no damage would be assessed for the loss of comfort, society and protection, unless there was evidence to show that such separation was only a temporary one, or that the parties in the immediate future would be reunited.

In *Pepper v. Southern Pacific Co.,* 105 Cal. 389, at p. 402, the court stated:

> "* * *It may well be doubted whether the facts of this case justified any, even the most guarded, instruction in relation to compensation for the deprivation of the comfort, society, and protection of the deceased. The son was twenty-five years of age, and had the legal right to change his residence to a remote part of the state, or of the world, at any time he chose. He was not living with the plaintiff, though in the same town."

In the case at bar, the decedent was deprived by said decree of divorce of the right to live with his son, or associate with his son, and was not even granted the mere right of visitation (without Mrs. Zehnle's consent).

In *Griffey v. Pacific Electric Ry. Co.,* supra, at page 522, the court stated:

> "* * * There is nothing to show that the mother ever received, or that she had any reasonable expectation of ever receiving, any financial aid or personal services from the daughter subsequently to the latter's marriage. And though the deprivation of society, comfort, and protection is an element of loss, it is as stated, an element of damage only when it has a pecuniary value. *Here the mother and father had lived apart for fifteen years, and the daughter, at the date of her death, was living in the father's house. Upon what theory, then, can it be said that in the daughter's death the mother suffered a deprivation of society, comfort, and protection having for her a pecuniary, as distinguished from a sentimental value? We can perceive none whatever.*" (Italics ours)

In *Sanfillippo v. Lesser,* supra, at page 90, the court stated:

> "This testimony includes all of the plaintiffs' case and it appears therefrom that *there is no evidence that Philipp Sanfillippo, the husband, was living with the deceased at the time of her death or that her society was of any pecuniary value to him or that she rendered any services to him.* It appears that plaintiffs Mamie Mercurio and Salvatore Sanfillippo were married and did not reside with deceased. There is no evidence that they suffered the slightest pecuniary loss by her death. *As to the minor child, seventeen years of age, there is also no evidence that she resided with her mother, and not the faintest suggestion that she suffered any pecuniary loss by*

her death. It is always to be borne in mind that no recovery can be had for grief, sorrow, and mental suffering of the heirs of deceased." (Italics ours)

In *Powers v. Sutherland Auto Stage Co.,* 190 Cal. 487, the facts were that the decedent and his wife had lived separate and apart, although not legally separated or divorced for thirteen years, and that during that time she had received no support from her husband, with the exception of several small checks for five or ten dollars which he had sent to her at infrequent intervals. She had heard nothing from him and didn't know of his whereabouts for a six or seven year period prior to his death. From these facts it was urged that the widow had suffered no damage by reason of his death. The court held (p. 491):

"* * * *In view of the fact that the plaintiff and deceased had been living apart, nothing could have been awarded to the plaintiff for the loss of the society, comfort, and protection of the deceased.* The amount awarded is solely attributable, therefore, to the loss by the death of the husband of the legally enforceable right of support against him." (Italics ours)

In *Cossi v. Southern Pacific Co.,* 110 Cal. App. 110, there was involved an action by the father for the death of his ten year old son in an automobile accident, in which both mother and son were killed on November 11, 1927. The evidence shows that in 1925 the appellant's wife commenced an action for divorce and asked the custody of the children, but the action was never carried beyond the point of filing the complaint. In June, 1926, the wife

departed from her husband, taking with her their three children, including the deceased, and from that time until November, 1927, when the boy was killed, the appellant saw his family only once, and during a year and a half period the mother supported the children with the aid of what little money the children themselves earned. After stating the measure of damages in death cases, the court, on pages 112-113, stated:

> *"It was incumbent upon appellant to prove by a preponderance of the evidence that pecuniary injury was reasonably certain to be suffered by him from the death of his child. The jury may well have concluded from the facts before them that father and son were so little interested in one another that there was no reasonable certainty that the continued life of the son would be of any pecuniary value to the father."* (Italics ours)

From the case of *Burbidge v. Utah Light and Traction Co.,* 196 Cal. 556, it is shown that the Utah courts follow the California law on this question. In said case the decedent had lived separate and apart from his three minor children for about eighteen months prior to his death. The trial court gave the instruction that there was no evidence of the loss of society and companionship, and hence no recovery of damages could be had on that ground. The Supreme Court on appeal, in regard to the subject (p. 558) said:

> "The court instructed the jury that the plaintiff was not entitled to recover for loss of companionship and society of the deceased. No complaint is made to that instruction. We assume that none could have been made under the circumstances shown by the testimony."

These cases establish the local law and the law controlling this case, and it should be noted that in these cases in determining whether such loss did exist, the court was compelled in each case to accept the evidence as to conditions and circumstances existing at the time of the death. In none of the above cases was the jury allowed to speculate or imagine in the absence of evidence, as to whether or not the decedent and the beneficiaries might become reunited. Yet, in the case before the court the opinion, without foundation in the record, declared that there was a substantial likelihood that the deceased and the beneficiary would come together in a "father guardian relationship."

We further desire to call the court's attention to a more recent case of *Zeller v. Reed,* 26 Cal. App. (2d) 421, decided in 1938, in which case the plaintiff was the mother of the minor deceased. The father had died and the plaintiff had remarried. The plaintiff (mother) entered into a written contract with her brother-in-law, wherein the brother-in-law (the boy's uncle) agreed, at his expense, to provide a home, support, maintenance and education of the deceased, and that the uncle should be entitled to his services. There was evidence that in the ten years preceding the minor's death there had been three or four visits with his mother, and some correspondence between them. The court returned a verdict in favor of the mother, in the sum of One Thousand Dollars ($1,000.00), and the trial court granted a motion for a new trial as to the issue of the adequacy of damages only, upon the ground of insufficiency of the evidence to sustain the verdict, and in affirming the order granting a new trial, the court, on page 425, stated:

"* * * Under the evidence it is a very substantial award. The plaintiff had received nothing from the earnings of her son and there is nothing in the evidence to indicate that she had any reasonable ground for expecting any financial assistance from him. Their contacts in the ten years preceding his death had been confined to correspondence and three or four visits. While the trier of fact is vested with the primary duty of fixing the amount of damages that would be reasonable, it is obvious that a large award could not be supported by the evidence before us."

On the retrial of the above case, the jury rendered a verdict for Thirty-two Hundred Eighty Dollars ($3280.00), in favor of the mother. On appeal from said latter judgment, the appellate court (38 Cal. App. (2d) 622) (decided April 26, 1940) stated that the plaintiff went into greater detail concerning the mother's relations with her son than on the first trial, and on the second trial the evidence showed that she visited her son in California for about eighteen months in 1925 and 1926, and he visited her in Ohio during 1928, 1930 and 1931, for visits of three weeks, one month and six weeks, and that the minor was a kind, dutiful and affectionate son, that he had given his mother many gifts such as a dress, a coat, a brooch, twenty-five pounds of uncured olives, and various other things, and he wrote letters to his mother about three times during a month. In view of the fact that the uncle was entitled to receive all of the minor's services, it was held that the plaintiff could not be granted relief for that item, and the court held that any support that she may have received after he reached his majority could not be recovered, as the same would be based upon mere speculation.

Then the court followed the general rule in California, that in fixing pecuniary loss for the deprivation of society, comfort, and protection, the evidence must show some relation between the amount awarded and the evidence, and held that plaintiff's future loss from being deprived of the receipt of various gifts that would continue to be given by the minor to his mother, plus such meager loss of comfort, society and protection, would not warrant a verdict in excess of One Thousand Dollars ($1,000.00), and again held that an award of One Thousand Dollars ($1,000.00) was a very substantial award under the evidence then before it. The court then conditionally reduced the verdict from Three Thousand Two Hundred Eighty Dollars ($3,280.00) to One Thousand Dollars ($1,000.00).

It will be noted from this case that there was evidence of society, comfort, and protection rendered by the decedent to his mother in the form of letters and occasional visits, which could have had a small pecuniary value, and which when considered with the loss of future gifts from her son, would not under any hypothesis exceed One Thousand Dollars ($1,000.00).

There is much evidence in the Zeller case which does not exist in the case at bar, but the Zeller case is important for the reason that in said case the decedent and beneficiary lived in separate states, approximately the same distance apart as the respective residences of the deceased and the appellee in the case at bar, and likewise, the evidence in both cases showed that the deceased had a normal affection that a parent would have for a son, and, likewise, the contacts between the parties would be by correspondence and occasional visits. It is self-evident

that no jury should be permitted to award a greater amount to the appellee in the case at bar, than the California courts permitted under similar circumstances in the Zeller case, irrespective of the present value of the dollar.

The courts in California have recognized the right to recover pecuniary loss of comfort, society and protection where parties were living apart at the time of the death of the decedent, and where the evidence shows that such separation is only temporary or of short duration, and if death had not intervened, the parties would have again lived together. Such is the case of *Rickards v. Noonan,* 40 Cal. App. (2d) 266 (decided July 31, 1940), in which the plaintiff was the decedent's wife, and a judgment was awarded in her favor in the sum of $3,438.64. From the evidence it appeared that divorce proceedings had been instituted by the plaintiff against the deceased, for the plaintiff's purpose of reforming the deceased; that intermittently throughout their married life, the deceased had gambled considerably, and the plaintiff had attempted to break him of the habit, and sought the divorce to teach him a lesson; that she still loved him. Soon after the entry of the interlocutory decree the parties started to reconcile their marital difficulties, and some time prior to his death they began to see each other every other day or so, and during the two weeks preceding his death they had various engagements for lunches, dancing, playing games and riding together. They discussed going back together again. Sexual relations between them were had on the two nights preceding his death, and although they had become reconciled, they had not yet moved together again, because decedent had many bills to pay and he wanted to get on his feet first.

It was contended therein that the principle of *Powers v. Sutherland Auto Stage Co.,* supra, was applicable and no part of the award could be attributable to the loss of society, comfort and protection. The court held that said case was not applicable, because it was within the contemplation of the law that one of the important purposes of the interlocutory decree was to give the parties a chance to effect a reconciliation, and in this regard, the court, at page 274, stated:

> "* * * Reconciliation is to a great extent dependent upon the intention of the parties. The existence of such intention in the instant case is supported by evidence. Their frequent meetings and friendly companionship, their decision to reunite, their indulgence in sexual intercourse, their desire to move together as soon as their financial condition would permit, and the testimony that they had become reconciled, could result in a conclusion that a reconciliation had taken place."

Another such case is *Cannon v. Kemper,* 23 Cal. App. (2d) 239 (decided October, 1937). In this case the plaintiff recovered a judgment against the defendant in the sum of $25,000.00, for and on account of the death of her husband. Here too was a case where the husband and wife were separated at the time of the husband's death. The evidence set forth the circumstances of the separation, which is fully shown in the following statement of the court, appearing on page 244:

> "As to the fourth assignment of error, we may add that the record shows that the plaintiff and the deceased were not living together, that for three or four years the deceased had had difficulty in obtaining em-

ployment. The wife had returned to her mother's home in one of the southern states. It does not appear that the wife and the husband were estranged, or that any marital differences had caused their separation. Under these circumstances the cases cited by the respondent, to wit, Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192 (295 Pac. 41), Powers v. Sutherland Auto Stage Co., 190 Cal. 487 (213 Pac. 494), and People v. Stokes, 71 Cal. 263 (12 Pac. 71), sufficiently show that the plaintiff in this action was and is entitled to the damages awarded."

The foregoing cases constitute all of the cases that our research has revealed, involving the legal effect of the fact that decedent and beneficiary were living apart, upon the right to recover pecuniary loss for being deprived of society, comfort and protection, and in all of said cases the court deemed the evidence of the condition existing at the time of death as the gauge for determining whether such loss occurred, and in no instance was the jury permitted to speculate or imagine as to what could occur in the future, but were limited to the circumstances shown by the evidence.

Further, it is to be noted that, as provided in Section 1958, of the Code of Civil Procedure of the State of California, an inference is a deduction which the jury makes *from the facts proved,* without express direction of law to that effect. Hence, in the absence of fact proved, the law does not permit such inference as drawn by the court in its opinion.

Moreover, the law does not declare or create any presumption to the effect announced in the opinion. A presumption is a deduction which the law expressly directs

to be made *from certain facts* (Sec. 1959, C.C.P.). A research reveals no cases which even indicated that such finding could be derived through the operation of a presumption. However, the case of *Dean v. Oregon R. and Nav. Co.,* 80 Pac. 842 (Washington), which was approved in *Cossi v. Southern Pacific Co.,* supra, holds that where a minor son left the home of his parents without their consent and never sent them any of his wages or contributed to their support or assistance, it could not be presumed that the parents would have asserted their parental authority over said minor, at any time or place, when or where they might find him prior to reaching his majority, and collect his wages and thereby support a recovery for the death of said son. In this regard the court, on page 844, stated:

> "It is contended strenuously by appellant that respondent has shown no damages entitling him to any recovery. The evidence shows that the decedent left the home of his parents some years ago without their consent, and some time thereafter enlisted in the army, being dishonorably discharged therefrom a short time prior to his death. The evidence of respondent and wife shows that after decedent left, he never sent them any of his wages, or contributed to their support or assistance in any manner whatsoever. Appellant claims that these facts establish a manumission. Respondent argues that he had a right to assert his parental authority over said minor at any time or place when or where he might find him prior to his reaching his majority, and that he would have power to collect his wages, and that it must be presumed that the minor would return home or turn over his wages, or a portion thereof, to his

> parents. We do not think, under the facts of this case, that this presumption can be indulged * * *. But it appearing that he had abandoned the home of his parents, and had sent them absolutely nothing since said abandonment, we do not think it a fair presumption to be indulged that his conduct for the few years preceding his death would all be changed, and that he would soon be found returning home, or contributing his wages to the parents. This was a matter requiring proof. As the record stands now, we can find no evidence to sustain a verdict of damages."

The foregoing case is a compelling authority for the proposition that the probability of a change of custody or the probability of a decree directing the father to support his child are matters requiring proof. In the record in the case before the court there is no evidence or proof in this regard. If such proof is obtainable the opportunity to produce the same lies solely on the appellee, his mother or members of his father's family. We earnestly contend that this court should not permit such a verdict for a large amount of money to stand solely upon conjecture, surmise or imagination, but should direct a retrial and require the plaintiff to produce the proof, which under the law is the legal basis of a verdict in death cases.

This court has sustained a verdict upon an inference or presumption as to what might happen at some unknown and uncertain time in the future. There was as much reason for the court in the *Zeller* case, supra, to affirm the verdict of $3,280.00, upon the ground that the jury could have inferred that the uncle would voluntarily surrender custody of the minor to the mother, as there was

reason in the case at bar to affirm upon the inference that there might be a change of custody from the mother to the father.

The reason the court in the *Zeller* case did not permit the verdict to stand, was because the court was compelled to accept the existing relationship, when there was no evidence of the reasonable probability of a change in custody, and the court would not permit an inference of the happening of such change to be based on pure speculation and imagination.

Since it appears that the mother in the *Zeller* case loved her son at least as much as Zehnle loved the appellee, and the future contacts between the deceased and the beneficiary would have been approximately the same, it appears that recovery in the *Zeller* case is a fair and reasonable guide to the maximum recovery that could legally be allowed for this item of damage in the case at bar.

III.

NO PROOF OF LOSS OF SUPPORT

The court appears to have determined that the decedent was legally obligated to support his son for the full period of his minority, on the basis of a contribution of One Hundred Thirty-one and 65/100 Dollars ($131.65) per month. Apparently, the basis of the court's opinion is the improper assumption that the parents of the appellee were divorced in a substituted service proceeding, and hence the Nevada court had no power or jurisdiction to determine the amount of the father's obligation to sup-

port his son. As pointed out in appellant's briefs, there was absolutely no evidence in the record as to how the Nevada court acquired jurisdiction over Zehnle. The findings of fact and conclusions of law of the Nevada court, as shown by the decree of divorce, were that the defendant did not appear, but it appearing from the proof of service on file therein "that more than thirty (30) days had elapsed, since *due and legal service upon said defendant,* the default of the said defendant" was duly entered by the court within the time allowed by law (R. 43). The only evidence in the record relied upon to contradict such finding is set forth in a letter from the decedent to his then wife, dated November 10, 1944, where he states: "I received the summons from your lawyer. I guess you forgot to tell him I am a seaman."

Many things would have occurred which would have given the Nevada court jurisdiction in *personam* over the decedent. The decedent might have signed the customary document, used in the State of Nevada, which admits service of the summons and consents to the jurisdiction of the court. Furthermore, the decedent did not say where he received the summons. He could have received it in Nevada, in so far as appears from this record. The status of the record in the case at bar appears to be identical to the record in the case of *Davies v. Fisher,* 34 Cal. App. 137 at 140, where it is stated:

> *"In the decree of divorce granted to the plaintiff in the state of Nevada it is recited that proof of service of summons and complaint was shown to have been made. We will therefore assume, in so far as it is material here, that the Nevada Court acquired full jurisdiction over the subject matter and person of*

the defendant. We then find that the decree, after decreeing that the marriage be dissolved, awarded the custody of the minor child to the plaintiff, without making any provision for her support or maintenance. Under such a decree prima facie the husband is relieved from the liability on account of any claim for the support of that minor child." (Italics ours)

The letter of November 10th, does not state where Zehnle was when he received it, nor what type of service was made, nor does it reveal what he did after he received the complaint, or whether he consented to jurisdiction or not. Therefore, the Court's statement that said proceeding was a substituted service proceeding is without support in the evidence, and is based upon pure speculation. Again this missing evidence was available to appellee, but he elected not to introduce it.

In the event that the evidence did support the assumption of substituted service of process on Zehnle, nevertheless the Nevada court had jurisdiction to award the custody of the appellee to his mother, as the verified complaint in the divorce action recited that Jerry Zehnle was residing with the plaintiff in Washoe County, Nevada (R. 40), and hence the child and the mother were within the jurisdiction of the court (see *De La Montayna v. De La Montayna,* 12 Cal. 101 at 116). When the mother was awarded the exclusive care, custody and control of the child, Section 196 of the Civil Code of the State of California then became applicable, and the operation of such section to that circumstance placed the primary duty of the support upon Mrs. Zehnle. Since the child and Mrs. Zehnle were residents of the State of California at the

time of the death of the decedent, the California law would control as to the obligation of the decedent to support the appellee. Under the law of said state, as thoroughly shown by the appellant's briefs on file herein, the primary obligation was placed upon the person to whom said custody was granted, and it would remain there until that relationship was altered or changed by the circumstances outlined in the briefs and in the instructions of the trial court to the jury, which are set forth in the opinion.

We have no quarrel with the instructions set forth in the opinion. They all correctly recited the law, and the jury was instructed that the affirmative of the issue must be proved, which "means that the plaintiff is required to prove his case by a preponderance of the evidence" (R. 92). The jury was also instructed as to the definition of the "preponderance of the evidence." Every instruction in regard to damage was premised upon what the jury found from the evidence. The words "if any," in reference to losses, appear throughout all instructions, and hence the jury was compelled by these instructions to determine the amount of the losses, if any, from the evidence, and was expressly instructed that in estimating damages, the members of the jury must not "indulge in speculation or conjecture nor can you permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy" (R. 99).

The appellant is at a loss to understand how such instructions and the appellant's failure to except thereto, would debar this court from determining whether this verdict and judgment was sustained by the evidence.

As to this item of alleged damage, the same situation exists, as existed under the item of alleged damage discussed under point 2 hereof, in that there was no evidence of any reasonable possibility of voluntary contributions by the father to the son, if the father had lived (particularly because of his prior failure to support his family), nor was there any evidence that the substituted source of supply to the child would fail because of the failure or inability of Mrs. Zehnle to support her child. She admitted that she could work and was working, but she failed to testify as to what her earning ability was in dollars, or whether under such earning ability she would be able to support her son, or, in other words, perform her primary duty. That fact was within her own personal knowledge and easily capable of proof. The appellant should not be made to respond to a judgment in the sum of Twenty Thousand Dollars ($20,000.00), because appellee failed to assume his burden of proof, nor should the appellee be permitted to gamble upon the jury returning a larger verdict by and through inferences, by not putting in the proof within his guardian *ad litem's* personal knowledge, nor should he under any circumstances be permitted to obtain a verdict by refusing to prove what might have prevented a recovery.

Furthermore, the court's implication that if the question of the father's liability for the support of his son was litigated it *may well have been* for the latter's full support is not supported by the evidence. Mrs. Zehnle admitted that she had no knowledge of Mr. Zehnle's earnings since they were married, except for four months while he was in the Merchant Marine (R. 71), nor did she

testify as to the amount of her earnings. It is just as consistent to speculate that the mother was more able to support the child. Moreover, how could any court fix an obligation in dollars and cents, without knowing the financial circumstances of the father and the mother, yet this court permits this to be done in this case on the basis of One Hundred Thirty-one and 65/100 Dollars ($131.65), per month, without knowing such circumstances, and when during marriage, decedent contributed but $20.00 to $50.00 to the support of both his wife and child.

The plaintiff has no greater responsibility in a death case, than the decedent would have had himself, if he had lived, and hence the same requirements and procedure apply to the appellant that would have applied to the decedent, if he had lived, for, in the end the judgment is in lieu of support and maintenance only.

IV.

JUDGMENT WAS EXCESSIVE

The court, in its opinion, holds that "the power of appellate courts over damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury," and then "finds no excess in damages awarded." Generally speaking, assessment of damages are left to the sound discretion of the jury, which, however, as stated by the court in *Griffey v. Pacific Electric Co.*, 58 Cal. App. 509, at 516:

> "* * * subject to the supervisory power of the court and must be exercised in accord with the rules estab-

lished for the assessment of damages in cases of this character."

It is universally held in California that this discretion vested in the jury must not be abused, and that the amount allowed in death cases must be reasonably supported by the evidence. A judgment, the amount of which is not supported by the evidence, is deemed excessive as a matter of law. *Hunton v. California Portland etc. Co.,* 64 C.A. (2d) 867 (decided June 14, 1944).

The last mentioned case was an action where the plaintiff sought to recover for the death of his minor son. The jury on the first trial thereof, returned a verdict in favor of the plaintiff for $6500.00, which was reversed, and on retrial the jury returned a verdict for $40,000.00 for the death of the son, which the trial court reduced to $18,000.00. The Appellate Court recognized that in recent years somewhat larger judgments have been sustained than was formerly the case, but in reversing the judgment (as reduced by the trial court) as excessive, the court, on page 884, stated:

> "In the instant case, there can be no question that the allowance of $40,000 made by the jury was excessive both as not supported by the evidence and as indicating passion or prejudice. A former jury appraised the same loss, including the value of the truck, at $6,500. The question before us now is whether the court, in reducing this improper verdict, reduced it to an amount which may reasonably be said to be supported by the evidence. There is no definite evidence of pecuniary damage other than with respect to the value of deceased's services during the remainder of his minority, a little over three years.

> There is no evidence of other pecuniary loss any greater than would be the case with the ordinary boy of that age. An allowance of $3,000 or $4,000 for the services of the deceased during the remainder of his minority would have been liberal. The allowance for the value of his comfort, society and protection must bear a reasonable relation to such pecuniary loss as is shown by the evidence, and could not be very large. (Zeller v. Reid, 38 Cal. App. 2d 622 (101 P. 2d 730).) The respondent was 39 years old and engaged in a long established business, and any contributions from the deceased for support in his old age were not only remote and problematical but an allowance therefor in excess of $3,000 or $4,000 would hardly be supported by any evidence. Taking all of these things into consideration we are of the opinion that the amount to which the verdict was reduced by the court is still excessive, and that the largest amount which could be held to find any support in the evidence is $10,000."

As shown by the preceding case, the assessment of damages does not admit of a mathematical precision, but courts have continuously used the present value of past contributions as a guide to determine whether the award was reasonably supported by the evidence.

The case of *Wyseur v. Davis,* 58 Cal. App. 598, involved an action by the mother and father of decedent (their son). Plaintiff had a life expectancy of about nine years. The deceased was forty-seven years of age, unmarried, and a mining engineer, being in receipt of a salary of $250.00 per month. He had contributed $100.00 per month for their support, although the parents resided with another son. The court held that the amount of the verdict was excessive, and in this regard, on page 604, stated:

"Under such circumstances the verdict for $30,000 is excessive as a matter of law. 'The jury is always bound by the fundamental rule that pecuniary damage is the limit of recovery, and the amount allowed must bear some reasonable relation to the pecuniary loss shown by the evidence' (Dickinson v. Southern Pac. Co., 172 Cal. 727 (158 Pac. 183).) * * * The evidence shows that the parents would probably have received $1,200 a year from their son but for his death. At four per cent per annum they would receive an income of $1,200 a year on the amount of the verdict during the remainder of their lives, leaving the principal sum intact at the end thereof. Computing interest at the same rate, the present value of an annuity of $1,200 during their expectancy of life is $8,922. The pecuniary value of the son's comfort, society and protection could not amount to the additional sum of $21,078. The language of the court in *Dickinson v. Southern Pac. Co.,* supra, is applicable to the facts of this case. It was there said: 'Eliminating as we must, any consideration of grief and mental suffering occasioned to the survivors by the death, it is impossible to conceive how the loss of the comfort, society, and protection of the deceased could have had a money value of anything like the amount awarded by the jury.' "

Applying the principle of the *Wyseur* case to the case at bar, at four per cent per annum, the appellee would receive an income of $800 a year on the amount of the verdict during the remainder of his minority, leaving the principal sum intact at the end thereof. As shown heretofore, the jury must consider the amount of the contributions made by the decedent to his son during his

lifetime. Such contributions in the case at bar were twenty to fifty dollars per month to both wife and son, or, in other words, an average contribution of $37.50 or $450.00 per year, which makes the present value of such annuity the sum of $6,157.00. This assumption is based upon the premise (as unwarranted as it may be) that the decedent would continue to give his son alone what he heretofore gave to his wife and son. If there was a prospect for the increase of that contribution, the evidence must show it. The jury must not be allowed to speculate on the proposition that Zehnle would voluntarily increase such allowance, after he was advised that his wife had legally and voluntarily assumed the primary obligation to support his son. By filing a complaint with the Nevada court, she asked for a decree awarding her the sole care and custody of Jerry Zehnle, and did not seek any support for herself or their child from the decedent (R. 41).

It may be further noted this was before she knew whether she could or could not obtain service over the plaintiff within the jurisdiction of the court, or whether Zehnle would submit himself to the jurisdiction of the court. It would be more within the scope of the evidence to assume that when the wife's support was eliminated, the contribution (to the son only) would be cut in half, the present value of which would amount to $3378.50.

As stated in the *Wyseur* case, supra, it is impossible to conceive how the loss of the comfort, society and protection of the deceased (particularly, when the deceased and

the beneficiary were legally obliged to live separately, and in fact in separate states) would have had a money value of anything like $17,000 or $14,000.

The court, in its opinion, recognizes that the mother, Mrs. Zehnle, had been able to support the child during the first three years subsequent to the death of the decedent, but the jury clearly did not recognize that there should be any reduction in their verdict, because she had performed or could perform her primary duty for that period of years. The court, in its opinion, appears to have overlooked the fact that the sum of $20,000 is the present value of an annuity of $131.65 per month for the entire period of the appellee's minority.

Evans v. Oregon Short Line, supra, holds that,

> "in order to arrive at the real injury the wife or the minor children have sustained, the jury should be advised of just what they received from the deceased by way of pecuniary aid and assistance."

If that is the measure of damages in Utah, by what possible hypothesis would a verdict, based on $131.65 a month contribution be sustained. Secondly, the jury should not be permitted to assume that if he had lived, he would have given more, irrespective of the present value or the future value of a dollar, as there is not an iota of evidence of any reasonable possibility that he would or could have raised his contribution.

The record shows the habits and disposition of the decedent, and it shows how meager were his contributions to the family. It shows that the wife was obliged to divorce him, on the ground of utter failure to support his family. If there was any prospect of his increasing

his contribution, Mrs. Zehnle, who knew the deceased better than any jury, thought little or nothing of that prospect, because she filed and obtained the divorce decree on said ground of lack of support. There is no evidence of Zehnle's earnings during the entire period of his marriage (except when he was in the Merchant Marine). The jury had no basis to determine what his earning capacity was and what he was able to contribute to his family, or to his son. True, the decedent made $300 a month prior to 1941, as an electrical engineer, but he abandoned that employment and adopted farming as his occupation. Could the jury speculate that he would abandon farming and take up electrical engineering again? Could the jury assume that he would have earned $300 a month or better from his farming activities? The law says they cannot unless the evidence was adduced to support such finding. As we stated heretofore, if it can be assumed (which it cannot) that either the decedent would voluntarily assume the father guardian relationship with his son, or the mother's ability to support her son would cease, there is nothing in the evidence to support either of said conclusions, or whether they might arise in five, ten or fifteen years. Irrespective of this realm of conjecture and surmise, the jury found the pecuniary loss of monthly contributions to be four times the amount that decedent gave during his lifetime. How can it be held that the amount allowed bears some reasonable relationship to the pecuniary loss as shown by the evidence?

CONCLUSION

In view of the fact that this court affirmed a judgment based upon inferences and assumptions from facts which are not in evidence, this judgment should be reversed and the case remanded for a new trial, with direction that appellee produce evidence of his damage, i.e., earnings of decedent on the farm, his intentions for his future occupation, his prospects of future earnings, and the wife's earning capacity, her financial ability to support her son, her disposition as to the future custody of the son of the decedent, and many other kindred matters, all to the end that a jury could fix an amount of the pecuniary loss suffered by the appellee, which has some reasonable relationship to the evidence.

It is respectfully submitted that this case should be re-examined, and should be set down for re-argument, if the court so desires, at which argument counsel for appellant will be prepared to go fully into the merits of the points herein set forth.

Dated, Sacramento, California, September 23, 1947.

Respectfully submitted,

HORACE B. WULFF, and
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Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the counsel for Southern Pacific Company, a corporation, the appellant in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Sacramento, California, September 23, 1947.

HORACE B. WULFF,

Counsel for Appellant and Petitioner.